

From: Karl O . Pinc
To: Microsoft ATR
Date: 1/28/02 7:11am
Subject: Microsoft Settlement

Dear Sirs and Madams,

I attach 3 versions of my comments, a PDF file for printing, a HTML copy for following references, and a ASCII text copy for interoperability.

Regards,

Karl O. Pinc <kop@meme.com>

Subject: Microsoft Settlement
To: microsoft.atr@usdoj.gov (U.S. Department Of Justice)
From: kop@meme.com (Karl O. Pinc)
5512 S. Woodlawn
Chicago, IL 60637

Introduction

I write so that there is a public record which points out that the Stipulation and Revised Proposed Final Judgment¹ does not provide the relief claimed in the Competitive Impact Statement², and to point out that at least some of the failure of relief should be clear to anyone, with or without computer industry background. Further, I describe how the Proposed Final Judgment explicitly authorizes Microsoft's continued use of its monopoly powers to advantage over its competitors. I therefore conclude that the public and the marketplace would be better served if the Proposed Final Judgment was scrapped and the government imposed no penalty on Microsoft. Finally, I point out the means, as generally acknowledged in the industry, by which Microsoft intends to preserve and extend its monopoly and an obvious way in which Microsoft can be prevented from doing so.

I do not have time or energy to analyze the entire Proposed Final Settlement. I focus on only a few elements and how they meet the relief claimed:

"The Proposed Final Judgment will provide a prompt, certain and effective remedy for consumers by imposing injunctive relief to halt continuance and prevent recurrence of the violations of the Sherman Act by Microsoft that were upheld by the Court of Appeals and restore competitive conditions to the market."³

Contractual freedom unrestrained by monopolist pressure

Starting with the first relief claimed:

"Ensuring that computer manufacturers have contractual and economic freedom to make decisions about distributing and supporting non-Microsoft middleware products without fear of coercion or retaliation by Microsoft, by broadly prohibiting retaliation against a computer manufacturer that supports or distributes alternative middleware or operating systems."⁴

Let us examine this claim. Presumably, the following elements provide the above relief:

"Microsoft shall not enter into any agreement with:" (item 1.) "any IAP, ICP, ISV, IHV or OEM that grants Consideration on the condition that such entity distributes, promotes, uses, or supports, exclusively or in a fixed percentage, any Microsoft Platform Software, ..."⁵

In plain english, Microsoft may not prohibit an OEM⁶ from putting a non-Microsoft program on the computers they sell. However, note the exception that immediately follows:

"except that Microsoft may enter into agreements in which such an entity agrees to distribute, promote, use or support Microsoft Platform Software in a fixed percentage whenever Microsoft in good faith obtains a representation that it is commercially practicable for

the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software”

At first glance, it seems that Microsoft *can* require OEMs to distribute Microsoft software, but only in equal or smaller quantity than the OEMs distribute non-Microsoft software. Indeed, this would be the case if product at issue was not software. However, Microsoft need only require OEMs to distribute Microsoft software in a quantity which matches not the *actual* quantity of non-Microsoft software shipped, but the quantity of non-Microsoft software which is “commercially practicable” the OEM to ship. To investigate the ‘commercial practicality’ of distributing non-Microsoft software, examine a short list of products which are the primary competition for various Microsoft products:

- The Netscape⁸ web browser in place of Microsoft Internet Explorer (IE)
- The AOL⁹ software used to connect to the AOL Internet service in place of Microsoft Internet Explorer which connects to the MSN Internet service
- The Apache¹⁰ web server in place of Microsoft Internet Information Server (IIS)
- Linux¹¹ in place of Microsoft’s operating systems (XP, Win 2000, Win ME, Win 98, Win95, etc.)
- StarOffice¹² in place of Microsoft Office (Word, Excel, Power Point, etc.)¹³

The above non-Microsoft programs all have one thing in common. *They are free of charge.* The only cost associated with the distribution of these programs is the amount of space the programs occupy on the computer’s hard drive, a negligible cost in today’s era of cheap hard drives. Or, looked at another way, the computer’s owner can completely recoup the disk space taken by any of these programs for the cost of dragging the program into the trash. For all intents and purposes these programs, arguably Microsoft’s strongest competitors, are free. This means it is ‘commercially practicable’ for an OEM to distribute any or all of these programs with every computer sold.

Therefore under the terms of the Proposed Final Judgment, Microsoft may require “any IAP, ICP, ISV, IHV or OEM” to include a Microsoft program *100% of the time.* The Proposed Final Judgment allows Microsoft to collect a ‘tax’ on every sale. Should Microsoft for some reason find it to its advantage *not* to charge for its software, the simple fact that a product is *always* sold with Microsoft programs pre-installed is an advantage not granted to the competition. Imagine how much it would cost to have someone install, for example, a copy of the Microsoft XP operating system on a computer you already own.

As written, this clause of the Proposed Final Judgment authorizes Microsoft to continue to reap advantage from its monopoly. Removing this loophole seems straightforward. The clause could read:

except that Microsoft may enter into agreements in which such an entity agrees to distribute, promote, use or support Microsoft Platform Software in a quantity equal or less than the distribution, promotion, use or support for software that competes with Microsoft Platform Software

On casual reading of the judgment the appearance is that this clause does nothing more than allow Microsoft to negotiate a share of business comparable to the it’s competitor’s share. Yet the simplicity of the revision which would meet this ‘fair share’ requirement leads me to conclude that the more complex “commercially practicable” phrasing of the Proposed Final Judgment is deliberately included to allow Microsoft

to use its monopoly to force contractual arrangements which ensure the ubiquitous presence of Microsoft software on all computers.

Indeed as:

"Nothing in this provision shall prohibit Microsoft from enforcing any provision of any license with any OEM or any intellectual property right that is not inconsistent with this Final Judgment." ²⁷

the final judgment clearly allows Microsoft to make contracts requiring the distribution of its software on all of a vendor's products if the vendor wants to distribute any of Microsoft's products.

Competitive market conditions

The Competitive Impact Statement state that the purpose of the judgment is to "restore competitive conditions to the market". ²⁸ To see that the judgment does not accomplish this goal you must first acknowledge that Microsoft's most significant competition is not based in any one company. Microsoft's most significant competition is from Open Source^{29 30} software. If this is apparent to you, feel free to skip forward.

The Open Source competitor

To make clear the magnitude of the threat posed by Open Source to Microsoft, I analyze here the entire range of Open Source programs. The non-Microsoft programs mentioned in this segment are all Open Source unless otherwise indicated. Although the Competitive Impact Statement emphasizes middleware, and the middleware competitive market, in the words of the Competitive Impact Statement, it is Microsoft's "operating system monopoly" that Microsoft engaged in illegal acts to protect. Therefore an analysis of more than just middleware competition is in order. Microsoft has illegally bolstered its operating system business and the remedy should address the competitive market for operating systems as well. Irrespective of what the remedy addresses, the presence of Open Source operating systems in my examples serve to illustrate the power of Open Source software as a class of programs and in no way diminish the threat Open Source middleware poses to Microsoft.

First, note that the Open Source operating systems are the only ³⁴ operating systems which run on the same hardware as the Microsoft operating systems, the PC hardware. Almost by definition they are Microsoft's only competition. Although Microsoft seems entrenched in the dominant position as the software supplier for "commodity" computer hardware, it is clear that in many emerging markets Open Source software is the market leader, not Microsoft. The Apache web server is the market leader with twice the market share of Microsoft. ³⁵ Open Source leads Microsoft in the embedded systems ³⁸ market. ³⁹ Linux is replacing existing Unix systems in the fast paced environment of the special effects studios. ⁴³

Open Source software is capturing markets Microsoft hopes to move into, and even appears to be eroding some of Microsoft's existing markets. The market share of Open Source software is often hard to measure, as there is centralized distribution point, but by all accounts the share of Open Source operating systems on server ⁴⁶ systems is growing. A (Microsoft funded) Gartner⁴⁷ study⁴⁸ (3rd Qtr, 2000) found 8.6% of the servers sold were shipped with Linux. A IDG⁴⁹ study⁵⁰ (Aug, 2000) found Linux had achieved a 17.2% penetration in the server market. InfoWorld⁵¹ (Aug, 2000) reports⁵² the Gartner study predicts "that by 2005, Linux, Unix, and Windows 2000 will account for 77 percent of the server market. More important, the report expects

that the 77 percent will be split equally among the three." Point of sale systems are moving to Linux. ZDNet⁵³ reports⁵⁴ (Jan, 2002) "Bosco's, with 36 locations in six states in the mid-Atlantic region is replacing 500 Windows NT servers with Linux on an IBM zSeries 900 mainframe". Even the traditionally conservative financial services market is adopting Linux. Information Week⁵⁵ reports⁵⁶ (Oct, 2000) "Linux is gaining a foothold on Wall Street and in the broader financial-services community". An IBM⁵⁷ press release⁵⁸ (Aug, 2001) hollered "WALL STREET MOVES TO LINUX AND IBM FOR FINANCIAL TRADING" when portions of the New York and American Stock Exchanges began to run on Linux. Mainstream publications are beginning to publish Linux related information for the general public, like The Chicago Tribune⁵⁹'s Linux and Things⁶⁰ series. It's no wonder that the arrival of a Microsoft Office compatible Open Source program, like the aforementioned Star Office Suite or the AbiWord⁶¹ word processor or the Gnumeric⁶² spreadsheet are considered developments which could finally break Microsoft's hold on the computer desktop. An October, 2001 analysis^{63 64} of the Open Source movement for the British Government concludes "we as yet see no sign that OSS will become a viable alternative to Microsoft Windows, for user's (general purpose) desktop machines in the corporate or home PC markets. However, OSS on the desktop may soon become a significant player in the developing world." It also concludes "Within five years, 50% of the volume of the software infrastructure market could be taken by OSS."

The progress made by Open Source programmers has not been lost on Microsoft. In October of 1998 internal Microsoft documents which discussed the threat to Microsoft posed by Open Source and possible responses was leaked to the public. These internal Microsoft documents became known as the Halloween documents⁶⁶, these documents were later confirmed⁶⁷ authentic by Microsoft. In October of 1999 Wired⁶⁸ reported⁶⁹ "Aubrey Edwards, group product manager in the business enterprise division at Microsoft." said "There's a lot of interest around Linux and we need to compete." In May, 2001 Microsoft spoke out against Open Source. ZDNet reported⁷⁰ "Microsoft on Thursday stepped up its long-running battle against the open-source software movement", and in another story⁷¹ said "the speech came across as an attack, as if Microsoft feels the desperate need to discount what people see around them—that open-source software is doing real and solid computing work for an ever-growing number of computer users, big and small." It appears Microsoft is increasingly threatened by Open Source. The Register⁷², a British news source which writes in an excitable style reported⁷³ in Dec, 2001 that it had obtained a confidential memo from Microsoft Windows Division Vice President Brian Valentine who was reported to have written to his sales team "Linux is the long-term threat against our core business. Never forget that!".⁷⁴

Judgment sanctioned suppression of the Open Source competition

The Proposed Final Judgment is supposedly

"Creating the opportunity for software developers and other computer industry participants to develop new middleware products that compete directly with Microsoft by requiring Microsoft to disclose all of the interfaces and related technical information that Microsoft's middleware uses to interoperate with the Windows operating system."⁷⁵

However, the judgment allows Microsoft to withhold "all of the interfaces and related technical information" from Microsoft's most significant competitor, the Open Source programmer. This is because Open Source software is not, historically, produced by a company. It is produced by a loose collection of individuals who use the Internet to collaborate, some of whom are sometimes paid for their efforts by the companies which employ them. The judgment reads:

"Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, for the sole purpose of interoperating with a Windows Operating System Product, via the Microsoft Developer Network ("MSDN") or similar mechanisms, the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product" ⁷⁶

But Open Source programmers are not ISVs, IHVs, IAPs, ICPs or OEMs and so Microsoft need not disclose anything to them. Open Source programs are, by definition, given away if they are distributed by their author. Not only is there no company to which Microsoft can release a license granting information, there is no money to pay for such a license. The Judgment continues:

"Microsoft shall make available for use by third parties, for the sole purpose of interoperating with a Windows Operating System Product, on reasonable and non-discriminatory terms (consistent with Section III.I), any Communications Protocol that is, on or after the date this Final Judgment is submitted to the Court, (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate natively (i.e., without the addition of software code to the client operating system product) with a Microsoft server operating system product." ⁷⁷

But, the cited Section III.I makes it clear that the disclosure again need only be made, under license, to ISVs, IHVs, IAPs, ICPs, or OEMs. The Open Source programmer is excluded.

To exclude any possibility that Microsoft might have to release specifications to an Open Source programmer the judgment requires that the information recipient must have "a reasonable business need for the API, Documentation or Communications Protocol" ⁷⁸ and that Microsoft will judge "the authenticity and viability of its business" ⁷⁹ before releasing information. Open Source programming is not a business, and is therefore explicitly excluded.

Clearly the Proposed Final Judgment benefits the large commercial software developer, and excludes the Open Source movement, Microsoft's most significant competitor, from the benefits. Microsoft can only gain from the inevitable lessening of Open Source's market share.

A continued extension of the Microsoft monopoly

Microsoft is widely acknowledged to be attempting to become the primary issuer of electronic identity documents. The idea is that each individual is to have a single user-name and password, held by Microsoft. This new "passport" is to replace the separate user-names and passwords presently issued by banks, merchants, bulletin boards, and anybody who requires authentication before access is granted to a web site or other electronic document. Microsoft's product is called "Passport", and it's an essential component of Microsoft's new .NET technology. Note that the centralization of the identification information, and the corresponding tendency toward a 'natural monopoly', is intrinsic to the Passport idea.

Microsoft is explicitly not required "to document, disclose or license to third parties: (a) portions of APIs or Documentation or portions or layers of Communications Protocols the disclosure of which would compromise the security of" ... "authentication systems" ⁸⁰. As the Passport technology is all about communications protocols supporting authentication systems, the judgments again authorizes Microsoft to keep secret the information it uses to extend it's monopoly.

A reasonable way to prevent the extension of Microsoft's monopoly would be to require Microsoft split off its Passport division.

Conclusion

That a judgment should be so flawed, so unable to provide relief, and so sympathetic to the monopoly it is supposed to be protecting the public from, and that such a judgment is the second try at a resolution, leads me to believe that, for whatever reason, the judicial system is unable to provide any relief and will only make things worse should it change the status quo. As it stands, the proposed judgment is clearly worse than no judgment, as it explicitly grants Microsoft the right to use its monopoly power to suppress its competition. Left to itself, Microsoft will eventually collapse under its own weight, as IBM did. I urge the court to reject the Proposed Final Judgment.

BEGIN RATIONALE: Although it's not within the court's power to so order, and shouldn't be, it's too bad that the obvious remedy cannot be applied – a moratorium on federal government purchase of Microsoft products. :-) END RATIONALE:

Notes

1. <http://www.usdoj.gov/atr/cases/f9400/9495.htm>
2. <http://www.usdoj.gov/atr/cases/f9500/9549.htm>
3. Competitive Impact Statement, Section I
4. Competitive Impact Statement, Section I
5. Proposed Final Judgment, Section III, Sub-Section G
6. Original Equipment Manufacturer, i.e. the folks who sell computers.
7. Proposed Final Judgment, Section III, Sub-Section G, item 1
8. <http://browsers.netscape.com>
9. <http://free.aol.com/>
10. <http://httpd.apache.org>
11. <http://www.linux.org>
12. <http://www.sun.com/software/star/staroffice>
13. You may never have heard of
 14. <http://www.sun.com/software/star/staroffice>
or its twin
 15. <http://www.openoffice.org>
. They are sponsored by
 16. <http://www.sun.com>
. To quote a
 17. http://www.govtalk.gov.uk/documents/QinetiQ_OSS_rep.pdf
"The first real trials are starting now." Early adopters include
 18. <http://www.newsforge.com/article.pl?sid=01/08/10/1441239>
and
 19. <http://www.vnunet.com/News/1124456>
. You know some thing's up when you suddenly get
 20. http://www.businessweek.com/magazine/content/02_04/b3767021.htm

of the old StarOffice, which has been available since at least December 1999, in response to the interest generated by

21. <http://consultingtimes.com/sofeatures.html>
22. <http://www.techtv.com/print/story/0%2C23102%2C3351510%2C00.html>
23. <http://www.linuxplanet.com/linuxplanet/reviews/3818/2/>
the
24. <http://www.linuxplanet.com/linuxplanet/reviews/3857/1/>
25. <http://www.linuxplanet.com/linuxplanet/reviews/3841/2/>
StarOffice. (A sample quote:
26. <http://www.smartcomputing.com/editorial/article.asp?article=articles%2Farchive%2Fc0101%2>
)
14. <http://www.sun.com/software/star/staroffice>
15. <http://www.openoffice.org>
16. <http://www.sun.com>
17. http://www.govtalk.gov.uk/documents/QinetiQ_OSS_rep.pdf
18. <http://www.newsforge.com/article.pl?sid=01/08/10/1441239>
19. <http://www.vnunet.com/News/1124456>
20. http://www.businessweek.com/magazine/content/02_04/b3767021.htm
21. <http://consultingtimes.com/sofeatures.html>
22. <http://www.techtv.com/print/story/0%2C23102%2C3351510%2C00.html>
23. <http://www.linuxplanet.com/linuxplanet/reviews/3818/2/>
24. <http://www.linuxplanet.com/linuxplanet/reviews/3857/1/>
25. <http://www.linuxplanet.com/linuxplanet/reviews/3841/2/>
26. <http://www.smartcomputing.com/editorial/article.asp?article=articles%2Farchive%2Fc0101%2F59>
27. Section III, Sub-Section A, paragraph 3
28. Competitive Impact Statement, Section I
29. <http://www.opensource.org>
30. I use the term "Open Source" loosely in this document to encompass both the
31. <http://www.opensource.org>
and the
32. <http://www.gnu.org>
Speaking rigorously the Free Software movement's
33. <http://www.gnu.org/copyleft/>
are the largest threat to Microsoft, although much Open Source software giving
Microsoft stiff competition is not licensed under a copyleft-style license.
31. <http://www.opensource.org>
32. <http://www.gnu.org>
33. <http://www.gnu.org/copyleft/>
34. As far as I know.
35. See the various methods of measurement and market breakdowns at the widely
followed
36. <http://www.netcraft.com/survey/>

and

37. http://www.securityspace.com/s_survey/data/index.html
web server surveys.

36. <http://www.netcraft.com/survey/>

37. http://www.securityspace.com/s_survey/data/index.html

38. Embedded systems are the software that runs computers built into items which are not themselves computers – the computers in everything from cell phones to dishwashers.

39. A

40. <http://www.evansdata.com/emtarg.htm>

41. <http://evansdata.com/ESTOC.htm>

shows the number (27%) of embedded developers choosing Linux for their next project to be nearly double the number (14.1%) choosing the Microsoft product.

According to a (April 2001)

42. <http://www.linuxdevices.com/articles/AT2492406168.html>

survey, "the percent of developers considering using Embedded Linux for new projects has zoomed to the number two spot (38%) – second only to market leader Wind River's VxWorks."

40. <http://www.evansdata.com/emtarg.htm>

41. <http://evansdata.com/ESTOC.htm>

42. <http://www.linuxdevices.com/articles/AT2492406168.html>

43. From the on-line news source

44. http://www.salon.com/tech/feature/2001/11/01/linux_hollywood/
: "Linux goes to the movies" "Who says free software is passe? Hollywood's special-effects industry can't get enough of the operating system built by hackers, for hackers." The movies Shrek and

45. <http://www.nwfusion.com/newsletters/linux/2001/01156783.html>
were brought to you by Linux.

44. http://www.salon.com/tech/feature/2001/11/01/linux_hollywood/

45. <http://www.nwfusion.com/newsletters/linux/2001/01156783.html>

46. as opposed to desktop

47. <http://www.gartner.com>

48. <http://www.gartner.com/DisplayDocument?id=330693>

49. <http://www.idg.com>

50. <http://www.cnn.com/TECH/computing/9904/02/linuxgrow.ent.idg/>

51. <http://www.infoworld.com>

52. <http://www.infoworld.com/articles/op/xml/00/08/14/000814opbiggs.xml>

53. <http://www.zdnet.com>

54. <http://techupdate.zdnet.com/techupdate/stories/main/0,14179,2841690,00.html>

55. <http://www.informationweek.com>

56. <http://www.informationweek.com/808/linux.htm>

57. <http://www.ibm.com>

58. http://www.ibm.com/servers/eserver/zseries/os/linux/zseries_stock.html

MTC-00027602_0009

59. <http://chicagotribune.com>
60. <http://chicagotribune.com/technology/developers/chi-linuxgallery.storygallery?coll=chi%2Dtechr>
61. <http://www.abiword.org/>
62. <http://www.gnumeric.org>
63. http://www.govtalk.gov.uk/rfc/rfc_document.asp?docnum=429
64. The
 65. http://www.govtalk.gov.uk/documents/QinetiQ_OSS_rep.pdf
is available as a PDF.
65. http://www.govtalk.gov.uk/documents/QinetiQ_OSS_rep.pdf
66. <http://www.opensource.org/halloween/index.html>
67. <http://www.linuxworld.com/linuxworld/lw-1998-11/lw-11-halloween.html>
68. <http://www.wired.com>
69. <http://www.wired.com/news/linux/0,1411,31801,00.html>
70. <http://zdnet.com.com/2100-1106-814293.html?legacy=zdn>
71. <http://www.zdnet.com/anchordesk/stories/story/0,10738,2717631,00.html>
72. <http://www.theregister.co.uk>
73. <http://www.theregister.co.uk/content/4/22770.html>
74. To my knowledge, the authenticity of this memo has not been denied by Microsoft.
75. Competitive Impact Statement, Section II, bullet 6
76. Proposed Final Judgment, Section III, Sub-Section D
77. Proposed Final Judgment, Section III, Sub-Section E
78. Proposed Final Judgment, Section III, Sub-Section J, Paragraph 2
79. Proposed Final Judgment, Section III, Sub-Section J, Paragraph 2
80. Proposed Final Judgment, Section III, Sub-Section J, Paragraph 1